Supreme Court, U.S.
FILED
DEC 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT P. NEWMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The most remarkable feature of the government's brief in opposition is that it entirely abandons both the ruling of the court of appeals and the position that it urged below. Thus, instead of adhering to its previous argument that district courts have no authority to disclose grand jury records beyond that expressly conferred by Rule 6(e), the government now agrees with petitioner that Rule 6(e) does not erect an absolute barrier to access to grand jury records. As a result of this radical shift in position, the government now frames the question presented in this case as "[w]hether a district court may release grand jury materials to a private party for the purpose of conducting historical research." Opp. at I. However, neither court below addressed that question, but decided instead that the absolutist position advanced by the government precluded its consideration.

Thus, at the government's urging, the court of appeals looked no further than the specific exceptions in Rule 6(e) and decided that "[s]ince a claim of historical importance, without more, falls outside the scope of the Rule 6(e)(3) exceptions permitting disclosure, the district court's denial of Professor Newman's petition to unseal the Lattimore grand jury transcripts was

appropriate." App. 3a. In so ruling, the court adopted the government's view that "the explicit terms of Rule 6(e) and previous judicial precedent provide no authority for Courts to infer any 'inherent discretion' to grant the petition," Motion for Summary Affirmance at 3, and therefore "disclosure may not be made 'except as otherwise provided for in these rules.'" District Court Opposition at 2.

Since the court of appeals' decision erects an absolute barrier to access to grand jury records outside of Rule 6(e), which even the government now concedes is unwarranted, it does not raise the question presented by the Solicitor General, but instead raises the very different question presented by petitioner: "Does Rule 6(e) of the Federal Rules of Criminal Procedure completely divest federal courts of their inherent supervisory power to unseal grand jury records for reasons that are not expressly set forth in Rule 6(e)?" Pet. at i.

This shift in the government's position on whether Rule 6(e)'s exceptions are exclusive is confirmed by the Department of Justice's position in another action that arose shortly after the court of appeals adopted that view. In response to a request from the Committee on Standards of Official Conduct of the House of Representatives for access to grand jury records pertaining to Representative Fernand J. St. Germain, the Justice Department "fully support[ed] the Committee's application," even though there is no Rule 6(e) exception for congressional investigations. Department of Justice's Memorandum in Support of Committee's Application for Order Permitting Disclosure of Grand Jury Materials, *In re Possible Violations of 18 U.S.C.§201*, Misc. No. 88-253 (D.D.C., filed Sept. 2, 1988). It is wholly inconsistent for the Department to close the door to petitioner's request by arguing to the court of appeals that Rule 6(e) is an absolute shield, and then join in another request for access to grand jury materials that also falls outside Rule 6(e).

Nor should the government be permitted to defend the deci-

sion below, which accepted its now-abandoned position, by arguing that courts have some inherent authority to unseal grand jury records outside of the Rule 6(e) exceptions, but that it is either improper or unwise for them to exercise that power in the circumstances of this case. Since neither the court of appeals nor the district court ever passed on that question, this Court should vacate the lower court's decision and remand this case for a determination of whether the records should be released under the district court's inherent supervisory authority over grand jury records. Alternatively, given the confusion and disarray in the law in this area, the Court should hear this case to clarify the extent to which federal courts have inherent authority to unseal grand jury records for reasons that are not expressly set forth in Rule 6(e).

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted, and the Court should either vacate the court of appeals' decision and remand this case for further proceedings, or grant plenary review.

Respectfully submitted,

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December 1988

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